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Supreme Court of the United States

OCTOBER TERM, 1942

No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY and NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,
Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

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Counsel for Petitioners.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the undersigned, submit this petition and pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit insofar as it affirmed the final judgment of the United States District Court for the Western Division of the Western District of Missouri, insofar as the said judgment of the District Court adjudicated the right of the respondent, the Burlington Railroad, to condemn the property in the said judgment described.

Jurisdiction and Timeliness of the Present Application

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (U. S. C. Title 28, section 374(a)).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was made on March 2, 1943 (R. 2036). The opinion is found at R. 2014.

On March 16, 1943, the Circuit Court made an order (R. 2040) staying the mandate of that court for a period of sixty days from that date, and providing that if within such sixty days there is filed with the Clerk of that Court a certificate of the Clerk of this Court that a petition for writ of certiorari, record and briefs have been filed, the stay granted shall continue until the final disposition of the case in this Court.

The complaint was filed in the District Court on November 12, 1938. Jurisdiction was predicated upon diversity of citizenship—the plaintiff is an Illinois corporation and the defendants corporations or residents of Missouri. The Burlington, plaintiff below, sought to condemn nineteen separate rights of way about seventeen feet in width, totaling about nineteen acres and 10.8 miles of lead tracks and certain switch turnouts located in the north Kansas City Industrial District of North Kansas City, Missouri. These tracks connected with sidings for approximately one hundred industries located in the said district and connected with the main line of the Burlington which ran parallel to the Missouri River. During the years 1923 to 1940, inclusive, there were 673,945 loaded cars transported over the tracks sought to be condemned. For the period from 1935 to August 31, 1941, inclusive; the number of cars operated was 247,011. In 1940 the number of cars operated was 34,499, and for the first eight months of 1941 the number of cars operated was 27,547 (Pl. Ex. 17, R. 468-9; Def. Ex. 66, R. 1272, 1516, 1517). The Burlington operated over the tracks and since 1921 paid to the Bridge Company $1.00 for each car transported. For a period of over thirty-five years each of the petitioners here had but three stockholders who owned the stock in equal shares, one of which stockholders was the Burlington itself. For that whole period the Burlington participated in the affairs of the companies and in

the construction of the very tracks here involved, but for reasons hereinafter set forth seeks to condemn them at this time. *The testimony is uncontradicted that the tracks are being used for railroad purposes and that Burlington intends to devote the tracks and rights of way for the very same purpose as that to which they now are being devoted* (R. 730, 765-6, 282).

Section 5248 R. S. Mo. 1939 provides:*

> "*Corporate powers to cease when* . . . If any corporation formed under this article shall not, within two years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and shall not within one year thereafter expend thereon not less than ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of the filing of its articles of association, as aforesaid, its corporate existence and powers shall cease; *Provided*, that if a portion of its road shall be finished and in operation, it shall continue its corporate existence with power to hold and manage the portion of its road so constructed and for no other purpose."

Section 1512 R. S. Mo. 1939 provides:

> "In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which by law, the corporation holding the same is authorized to put said lands * * *."

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* References are made to and quotations are made from the Revised Statutes of Missouri of 1939 even though a predecessor statute may have been in effect at a particular time referred to, if the particular statute has not been changed in the various revisions of the Missouri statutes.

Contentions Below

In the courts below the contentions of the parties were as follows: In support of its right to condemn, the Burlington contended (1) that the Development Company, (also a petitioner here) having the same stockholders as the Bridge Company, rather than the Bridge Company owned the tracks and rights of way sought to be condemned, and that the Development Company was a real estate company not authorized to operate a railroad and, therefore, pursuant to Section 1512 *supra* could not resist condemnation; (2) that the charter of the Bridge Company was forfeited in or before May 1911, before the tracks sought to be condemned were constructed,* because of the company's failure to construct the road described in its charter within the period prescribed by Section 5248 *supra,* and, accordingly, the Bridge Company had no authority to own or use the tracks, and that even if it did the charter did not authorize the dedication and ownership of the particular tracks and rights of way sought to be condemned. It contended therefore that under Section 1512 *supra* the defendants could not resist condemnation.

The defendants, on the other hand, contended (a) that the tracks belonged to the Bridge Company; that they were constructed upon the land of the Development Company with its consent and that, therefore, the Bridge Company had a perpetual easement for railroad purposes; (b) that the Bridge Company was in fact a Union Depot Company or a railroad and a union depot company, and that the self-executing forfeiture provisions of Section 5248 of the Missouri statutes did not apply to a Union Depot Company.**

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* It was conceded by the defendants that the tracks were constructed after 1911.

** The provisions of the Missouri statutes as to the formation and powers of Union Depot Companies are set forth in Appendix A of the annexed brief.

(c) that the land and tracks were being devoted to a public use; that under the doctrine of *State ex rel. Public Service Commission* v. *Missouri Southern R.R. Co.*, 279 Mo. 455, such use could not be abandoned; that the use for which they were sought to be condemned was the *same use* as that to which they were being devoted and that they could not be condemned for that same use by the Burlington; (c) irrespectice of all the foregoing, the defendant contended that the Burlington could not urge the forfeiture of the charter of the Bridge Company or that its operations or those of the Development Company, (if it owned the tracks) were ultra vires for the following reasons: For more than thirty years prior to the institution of the action, the Bridge Company and the Development Company were "close corporations" and each had but three stockholders, of which the Burlington was one, each stockholder owning one-third of the outstanding capital stock of the company; that during the same period Burlington actively participated in the direction and affairs of the companies, including the construction and operation by the Bridge Company of the *very tracks sought to be condemned;* that during this period of thirty years a great deal of money had been expended in the building of the tracks in question and in erecting a bridge over the Missouri River to connect with the same, which moneys in a large part were advanced by the holders of the other two-thirds of the stock in the aforesaid companies and by the Burlington itself; that the Burlington had continuously operated the cars over the tracks since 1921 and paid the Bridge Company $1.00 for each car transported thereover without any question as to the ownership of the tracks by the Bridge Company or as to its corporate existence, and it earned large profits from such operation; that through the years the Burlington had reported to the Interstate Commerce Commission that it was operating the railroad of the *Bridge* Company, and that it had done and acquiesced in the doing of innumerable other acts established upon the trial recognizing the Bridge Company as an existing entity.

In view of these facts and others not necessary to state at this time, it was contended that under the doctrine of quasi estoppel existing in Missouri (*Lawson* v. *Cunningham*, 275 Mo. 128), the Burlington was barred by its acquiescence, waiver and acceptance of benefits from claiming that the Bridge Company's charter had been forfeited, and that the ownership and operation of the tracks and rights of way were unauthorized by the charter. The defendants further contended that the recognized principle that there could be no waiver by contract of the right of condemnation was inapplicable; that that principle was predicated upon the public policy that land which was needed for a public use could not be withdrawn therefrom by private contract or otherwise, but that that principle was inapplicable here because here the property was already dedicated to the same public purpose. The defendants accordingly contended *not* that the plaintiff could not urge the right of condemnation but that the plaintiff could not urge condemnation because of the forfeiture of the defendant's charter or ultra vires, and that, therefore, the court must determine the right to condemn as if the Bridge Company was a *de jure* corporation operating *intra vires*, and upon that assumption it must simply determine whether the property was already dedicated to and used for the same public use as that to which the plaintiff concededly sought to put the property.

Finally, the defendants contended that the reason for the institution of this condemnation suit was that the defendants desired to build a crossing over the tracks of the Burlington so as to connect the tracks here sought to be condemned with the tracks of the Bridge Company which operated on the bridge over the Missouri River and connected with the defendants' tracks in Kansas City; that the Public Service Commission of Misosuri had granted an application of the Bridge Company to determine the method of the crossing, and that the Burlington feared that its monopoly in the transportation of traffic out and into the North Kansas City district would be ended and that the

shippers in that district would have the choice of carriers which would bring in and take out of the district the large amount of traffic involved.

Holding of the Circuit Court of Appeals

The Circuit Court of Appeals held in effect as follows: (a) That it was unnecessary to determine whether title to the land and tracks was in the Development Company or in the Bridge Company because *neither* could resist condemnation, and therefore the Court did not consider the evidence on this question. As to the Development Company it held that it was a real estate company unauthorized to own or operate a railroad company. It held further that if the Bridge Company were a railroad corporation, its charter was forfeited by virtue of Section 5248 *supra* in so far as any right to own the property sought to be condemned* that even if the defendant Bridge Company was a Union Depot Company or a Union Depot Company and a Railroad Company, the self-executing forfeiture provision above quoted was equally applicable; (b) that even if the charter were not forfeited, the construction of the particular tracks here sought to be condemned was ultra vires and that, for all these reasons, under Section 1512, *supra,* the plaintiff had the right to condemn; (c) as to waiver and acquiescence or quasi estoppel, the Court *did not consider the sufficiency of the evidence to sustain this defense,* but ignoring the underlying reason for the rule held that the contention of the

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* The court, however, specifically, held that it had no occasion to consider the question of the Bridge Company's corporate existence in relation to the bridge over the Missouri River which the Bridge Company sold to the City of Kansas City (Defendant's Exhibit 3), or in relation to any property other than that sought to be condemned and, therefore, the court did not determine that the Bridge Company's corporate existence was wholly forfeited, and the Burlington's right to condemn was affirmed "to the extent stated in the opinion" (R. 2020).

defendants that there could be a waiver of forfeiture or ultra vires was merely an attempt to argue that the exercise of the power to condemn might be subject to private estoppel and that the *only* limitations on the right to condemn were those contained in the aforesaid Section 1512. Accordingly, the Circuit Court of Appeals held that the plaintiff had the right to condemn the rights of way and tracks described in the complaint.

Proceedings in the District Court

In the District Court a separate trial without jury was had as to the plaintiff's right to condemn and an interlocutory judgment (R. 139) was entered adjudicating the existence of such right. Thereafter a trial as to the amount of damages was had before Commissioners and exceptions were filed to the Commissioners' report (R. 139). Thereupon, as provided by Missouri statutes, a jury trial was had on the issue of damages and a verdict rendered against the plaintiff in the amount of $835,000 (R. 151). Upon that verdict a final judgment was entered (R. 151) which adjudicated both the plaintiff's right to condemn and the obligation of the plaintiff to pay the said sum of $835,000. From this final judgment the defendants, petitioners here, appealed (R. 183) to the Circuit Court of Appeals for the Eighth Circuit and there raised the question as to the plaintiff's right to condemn, and the plaintiff in turn appealed (R. 179) from the final judgment insofar as it awarded said sum of $835,000., alleging errors in the admission of evidence and in the Court's charge to the jury. The Circuit Court of Appeals (R. 2036-7) upon the defendants' appeal affirmed the judgment insofar as it adjudicated the right to condemn, and upon the plaintiff's appeal reversed the judgment and ordered a new trial on the issue of damages. From the judgment of the Circuit Court of Appeals affirming the final judgment of the District Court adjudicating the right to condemn, the defendants prosecute this application.

Statement of Salient Facts

Before setting forth the specific questions presented for review and the reasons relied on for the granting of a writ of certiorari, it is essential that there be set forth a brief history of the North Kansas City enterprises and the participation of the Burlington in the affairs of the petitioners for a period of over twenty-five years. The Bridge Company was incorporated in 1901 (R. 269) under the name of the Union Depot Bridge and Terminal Railroad Company, which subsequently, in 1926, was changed to its present name (R. 275). Its charter (R. 270) recited that it was formed under Chapter 12, Article 2 of the Revised Statutes of Missouri (the statutes in effect being the revision of 1899), and that it was organized for the purpose of constructing and operating a standard gauge railroad and constructing, operating and maintaining a union depot. The charter specifically described the places to and from which the railroad was to be constructed.* The charter *further provided* that the Bridge Company was organized for the purpose of (R. 270, 273):

> " . . . construction, establishing, maintaining and operating a union station in or in the neighborhood of any city of this state, for passengers or freight depots or both, and relating to the building, maintaining and operating terminal railroads and terminal facilities to be used in connection with such union station or depot . . .
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> " . . . The further object and purposes of the corporation and for which it is formed are to construct, establish, maintain and operate in Kansas City, Missouri, a union station for passenger or freight depots, or both, with the necessary offices and rooms convenient therefor, and the appurtenances thereto . . . and to build, maintain and operate terminal railroads and terminal facilities to be used in con-

* The road specifically described was never constructed (R. 290-292, 747-751, 681-7).

nection with such union depot or station and to build, maintain and operate a railroad and railroad bridge over the Missouri River at Kansas City, Jackson County, Missouri, and to construct tunnels as and for approaches to said union station or depot; and to construct, maintain and operate in connection with said railroad bridge a toll-bridge for the passage of wagons, vehicles, foot-passengers and animals, and to charge reasonable rates of toll therefor, and to do and perform every act and thing necessary, requisite or proper to be done in and about and in connection with the objects and purposes aforesaid, and to avail itself of and to have, exercise and enjoy all the rights, powers and privileges conferred by the laws and statutes of the State of Missouri in such cases made and provided."

The Development Company acquired lands in the North Kansas City area.* The property at that time was owned in equal parts by what are described in the Record as the Swift and Armour interests (R. 744-747). In 1903 one-third of the stock of both companies was acquired by the Burlington so that the companies then had three stockholders, the Swift interests, the Armour interests and the Burlington, each owning one-third of the stock, described by witnesses as a "syndicate" or "partners" (R. 436, 451, 746). From that time on until the institution of the present suit, a period of thirty-five years, the Burlington continued to own one-third of the stock of the companies (R. 436, 1024), directly appointed one-third of the Board of Directors and the Executive Committees of the companies, and similarly the other two stockholders each appointed one-third of the directors and the Executive Committee (R. 758,

* In three instances the tracks were constructed on land standing in the name of the North Kansas City Land and Improvement Association and in the name of Hugh Curran and F. F. Fratt (R. 122, 123). These three are also parties-defendant to this suit (R. 34, 35, 135). Inasmuch as they are in the same position as the Development Company, no separate references will hereafter be made to them.

771). Between 1903 and 1909 attempts were made to interest other railroads in Kansas City in the building of a new Union Station (R. 285,751), but these efforts were unsuccessful because a different location was decided upon (R. 285, 751). In 1909 the Bridge Company began the construction of a bridge over the Missouri River (R. 292, 751-2, 1025), the piers for which were laid as early as 1902 (R. 760). The bridge was finished in 1911 as a double deck bridge (R. 292, 1025). The cost of the bridge was $1,870,000. (R. 760) and was paid for in the following manner: Each of the stockholders loaned the Development Company like sums of money and received notes therefor (R. 752, 420, 932-933, 760). The Development Company in turn paid the bills for the construction of the bridge, issuing checks therefor on the direction of the Bridge Company (R. 293, 759). The amounts thus advanced were charged on the Development Company's books to the Bridge Company and appropriate entries showing the obligations were made on the Bridge Company's books. The latter company gave notes to the Development Company for the money thus advanced (R. 752, 420, 932, 426, 434, 449). The construction of the tracks here sought to be condemned began in 1912 and continued through 1937 (R. 287-289). Payment for the construction was made by the Development Company and here again the costs were charged on the Development Company's books to the Bridge Company and the Bridge Company entered its obligation to the Development Company upon its own books (R. 420, 423, 434, 435). Beginning in 1912 with the construction of the lead and switch tracks, the Burlington operated cars thereon and furnished service to and from the industries in the area (R. 293, 294, 463, 464, 712). While it operated the cars under its own motive power and with its own crew, the Bridge Company maintained the tracks (R. 448, 450, 450, 465, 1267). At first the Burlington did not pay anything for the privilege of operating its cars over the tracks which were maintained at the expense of the Bridge Company (R. 625, 626, 799, 913-8,

1267).* In 1921 a contract was made under which the Burlington was to pay $1.00 for each car transported (R. 1006-10), but the tracks continued to be maintained by and at the expense of the Bridge Company (R. 448). Payments were made by the Burlington to the Bridge Company each month (R. 421, 422, 590-612). In 1927 the Bridge Company sold the bridge to the City of Kansas City and Clay County for $1,500,000., and under the deed and agreement (R. 800, Defendant's Exhibit 3)** to which the State Highway Commission was a party. The Bridge Company reserved an easement to use the lower deck of the bridge for railroad purposes and also certain other rights. The court left open the question whether the rights in the bridge were forfeited (See footnote p. 7). The Bridge Company also undertook certain important perpetual obligations executory in nature. It agreed, among other things, to operate, raise and lower the lift span to enable boats to pass through. The purchase price was paid over by the Bridge Company to the Development Company which credited the amount on the Bridge Company's notes and then used the moneys to pay the Development Company's notes which were held by the three stockholders, including the Burlington (R. 420, 760-1, 915-6).

Throughout the years the Burlington has regularly filed reports with the Interstate Commerce Commission listing the Bridge Company as the owner of the tracks and rights of way (R. 507-8, 516-558). The Bridge Company made reports to the State Tax Commission of Missouri and the State Board of Equalization as owner of the tracks and the latter assessed it as the owner thereof (R. 428, 429, 762, 935,

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* The question as to whether this contract was with the Bridge Company or the Development Company was litigated in the District Court and the Court found that the contract was with the Development Company. The Circuit Court, in view of its conclusions on the law, did not find it necessary to determine whether there was evidence to support this finding of the District Court (F. R. C. P. 81(a) Subdiv. 7 and Rule 52*a*).

** Original submitted with the Record.

937). It paid taxes thereon as railroad property (R. 762, 913). It appeared before the Public Service Commission as the owner of the tracks (R. 704). It was recognized as a corporate entity in a Deed and Agreement with the City of Kansas City, Clay County, Missouri and the State Highway Commission of Missouri under which the State Highway Commission assumed obligations to the Bridge Company. (Section 2, Defendants' Exhibit 3; R. 800). *At no time was its corporate existence or charter powers questioned. At all times the State and its agencies acquiesced in its ownership of the tracks.*

In the absence of a connection between the bridge over the Missouri River and the tracks which are here sought to be condemned, and which are north of the Burlington railroad, the Burlington had a most profitable monopoly on moving traffic in and out of the district (R. 1375) with revenues averaging hundreds of thousands of dollars (R. 1276-9, 1320-22).* The Bridge Company recognized that it would receive a more adequate return and that its lines could be operated more efficiently if its tracks north of the Burlington crossed the Burlington and connected with the bridge than with the tracks owned by the Bridge Company in Kansas City (R. 1327). Such a crossing would permit the Bridge Company to enter into operating agreements with a number of railroads, such as the Missouri Pacific and the Wabash, for the operating of cars into the North Kansas City district, and would give shippers a selection of carriers (R. 1313). Such a crossing had been planned ever since the first lead and switch tracks had been constructed and a right of way for that purpose had been reserved (R. 424, 452, 454-8, 1327).

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* During the years 1923 to 1940, inclusive, there were 673,945 loaded cars transported over the tracks sought to be condemned. For the period from 1935 to August 31, 1941, inclusive; the number of cars operated was 247,011. In 1940 the number of cars operated was 34,499, and for the first eight months of 1941 the number of cars operated was 27,547 (Pl. Ex. 17, R. 468-9; Def. Ex. 66, R. 1272, 1516, 1517).

In 1929 the Swifts and the Armours disposed of their stock and other interests to Terminal Shares, Inc., a wholly owned subsidiary of Alleghany Corporation (R. 436, 674-675) which was then the holder of a majority of the stock of the Missouri Pacific Railroad (R. 1032, 679). Terminal Shares, Inc. then pledged its stock to secure its notes and its notes (secured by said stock) in turn are pledged for bonds issued to the public by the Alleghany Corporation under three indentures (R. 1035, 271). The bonds and stock of Alleghany Corporation are widely held by the public and are dealt in on the New York Stock Exchange.

In *1931* the Bridge Company filed an application with the Missouri Public Service Commission asking it to fix the place and manner of crossing as provided by Missouri statutes (R. 668, 805). This proceeding was dismissed without prejudice pursuant to a stipulation of the parties that efforts to arrive at a settlement were being made (R. 829). Negotiations failed and the Bridge Company on May 7, 1937 (R. 839) filed a *second application.* The Burlington filed an answer (R. 846) wherein it admitted the corporate existence of the Bridge Company and its ownership of the tracks. Subsequently, however, the Burlington claimed to have "discovered" (R. 960, 999) for the first time that the Bridge Company's charter had expired many years before and that everything which had been done with the knowledge, approval and active cooperation of the Burlington was in fact done by a non-existent corporation. Burlington thereupon amended its answer in the proceeding before the Commission and alleged the forfeiture of the Bridge Company's charter because of its failure to construct the road. The Public Service Commission nevertheless granted the application in a comprehensive opinion (R. 875).* There-

* This opinion sets forth the history of the petitioners and while it leaves to the courts the question of forfeiture, estoppel, etc., it finds that the Bridge Company was an "existing organized entity exercising the function of a railroad company" and was under the jurisdiction of the Commission (R. 890, 891).

upon, instead of attempting to review the order of the Publice Service Commission upon which review the status of the Bridge Company could be determined in the State courts, the Burlington instituted a condemnation suit in the United States District Court for the condemnation of the lead tracks and rights of way. This suit was dismissed without prejudice because of the failure of the Burlington to attempt to agree with the defendants upon the price to be paid for the property as required by the Missouri statutes (R. 1291). Following this adjudication the present suit was instituted. Since the institution of the suit, application has been made by the Bridge Company to the Interstate Commerce Commission (Exhibit 23) (R. 1298), for a certificate of convenience and necessity for the construction of the tracks over the tracks of the Burlington. The application has been adjourned pending the outcome of this litigation.

No attempt will be made here to set forth the other facts upon which it was urged that the Burlington because of its acquiescence and waiver was barred from questioning the corporate existence of the Bridge Company, or to claim that the construction of the particular tracks was *ultra vires*, because the Circuit Court of Appeals did not *deem it necessary to* pass upon the sufficiency or legal effect of this evidence and held simply that as a matter of law there could be no estoppel.

The testimony is uncontradicted that the tracks are being used for railroad purposes and that the Burlington intends to devote the tracks and rights of way to the very same purpose as that to which they now are being devoted (R. 730, 765-6, 282).

Important Questions Presented

From the foregoing statement, it is apparent, however, that this effort to condemn the tracks and rights of way has its genesis in the fact that the Bridge Company is about to provide the North Kansas City industrial district with addi-

tional railroad facilities by building a crossing over the Burlington tracks and thus end the Burlington's monopoly in handling the freight in and out of the district; and that the Burlington, despite its active participation in the affairs of the defendant over a period of thirty-five years and in the construction of the very tracks sought to be condemned now seeks to maintain that monopoly and deprive the defendants of the benefit of its enterprise and the North Kansas City area of the additional service that would be provided. Whether this result should be permitted is a question of paramount importance to numerous industries in a large metropolis, a consideration which of itself warrants the granting of this petition. (See, *St. Louis, Kansas City and Colorado Railroad Company* v. *Wabash Railroad Company and City of St. Louis,* 217 U. S. 247, 251.)

The first question presented is whether the District Court had jurisdiction of this action. The Missouri condemnation statutes delegate to foreign railroad corporations the power of eminent domain* but provide that petitions for condemnations shall be filed in a particular State court—the Circuit Court of the county in which the land lies (section 1504, R. S. Mo., 1939).**

In *Madisonville Traction Company* v. *St. Bernard Mining Co.,* 196 U. S. 239 (decided in 1904), this Court held

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* *Gray* v. *St. Louis & San Francisco R. R.,* 81 Mo. 126; *So. Ill. etc.* v. *Stone,* 174 Mo. 1, 23.

** Sec. 1504. In case land, or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electrical corporation * * * and the owners cannot agree upon the proper compensation to be paid, or in case the owner is incapable of contracting, be unknown, or be a non-resident of the state, such corporation may apply to the circuit court of the county of this state where said land or any part thereof lies, * * * and praying the appointment of three disinterested freeholders, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establisment, erection and maintenance of such road, railroad, telephone, telegraph line, or electrical line * * *.

that a proceeding for condemnation pursuant to a state statute brought by a resident of the State could be *removed* into the Federal Court by a non-resident defendant landowner upon the ground of diversity of citizenship because the action was one of which the District Court would have originally had jurisdiction, and held in effect that the right and remedy were separable. This Court divided five to four on the question, a dissenting opinion having been written by Mr. Justice Holmes and concurred in by Chief Justice Fuller and Justices Brewer and Peckham. The question is whether this decision should be adhered to at the present time.

The second question is whether the District Court should have refused to entertain this action under the doctrine of *forum non conveniens* or the equivalent doctrine of "appropriate forum," and whether the assumption of jurisdiction was contrary to recent pronouncements of this Court. Jurisdiction is predicated on diversity of citizenship and the case involves solely the construction of Missouri statutes some of which have never been construed by the State courts by decision applicable here, and in addition involves questions of public policy of the State of Missouri which should be left to the State courts where, as here, those courts were equally available.

Specifically, the Circuit Court of Appeals had to pass upon the following intricate questions of state law:

1. The forfeiture statute (Section 5248 R.S. Mo. 1939).

2. The Acts of 1879 and 1899—the determination as to whether these made the self-executing forfeiture provision applicable to union depot companies.

3. The Union Depot Statute (Sections 5251 and 5252 R.S. Mo. 1939).

4. The application of the section limiting the right of condemnation by railroad companies (Section 1512 R.S. Mo. 1939).

5. The availability of the defense of waiver or estoppel, and whether such waiver or estoppel precludes predicating the right of condemnation upon forfeiture of charter or ultra vires alone.

The third question is whether the principle that a corporation to which has been delegated the sovereign power to condemn cannot surrender that power by private agreement and thereby free property from condemnation, has any application here where the property is already devoted to the same public use; and whether that principle precludes the defendants from urging that the acquiescence and waiver of the Burlington and its participation in the affairs of the defendants as stockholder and otherwise bars it from basing its right to condemn on forfeiture or ultra vires; and whether the right to condemn should not be determined as if the Bridge Company was a de jure corporation acting ~~ultra~~ vires—leaving as the only question whether the proposed use in fact is the same as the present use.

The fourth question is whether the court below erroneously construed section 1512 of the Missouri Revised Statutes of 1939* in holding that the Missouri legislature by that section had delegated to a railroad company the power to condemn property for the same public use as that for which it was already being used simply because the present owner's corporate charter had expired or the operation was ultra vires, and despite the fact that the state had never questioned the right to own and operate the property.

The fifth question is whether or not the defendant Bridge Company was a union depot company or both a railroad and a union depot company, and whether the self-executing forfeiture statute of Missouri, originally not applicable to such companies, has been made applicable by later legislation. This question in turn depends on whether the court below has not held in conflict with Missouri decisions that the later Acts did make the self-executing forfeiture provisions applicable.

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* Set forth at p. 3 *supra.*

Reasons Relied on for the Granting of the Writ

As to Jurisdiction of the District Court

The question as to whether the District Court had jurisdiction of this action is one which this Court must consider *sua sponte*. *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The question of the relationship between the State and Federal courts in condemnation cases, pursuant to state statutes which provide for the institution of the proceeding in a particular state court, and the true nature of such proceedings is one of paramount importance. Such cases, more than most, involve questions of the interpretation of state statutes and of state policies, and are peculiarly cases which should be determined in a State rather than the Federal court. Where a foreign corporation (such as the Burlington) avails itself of the right to condemn granted by the state, the provisions of the state statutes that the proceedings shall be instituted in a particular state court should be deemed a condition precedent to the exercise of the delegated right, i.e., the remedy or procedure shall be deemed a part of and inseparable from that delegated right.*

The question was considered in this Court in *Madisonville Co. v. St. Bernard Mining Co.*, 196 U. S. 239. The Court in a five to four decision upheld the jurisdiction of the Federal Court in a case where plaintiff condemnor was a resident and the defendant a non-resident landowner who removed the cause to the Federal Court. The majority opinion of Mr. Justice Harlan was concurred by Justices Brown, White, McKenna and Day. The dissenting opinion of Mr. Justice Holmes, concurred in by Justices Fuller, Brewer and Peckham, sets forth the reasons why the

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* *In State ex rel. St. Louis* v. *Beck*, 333 Mo. 1119 at 1123, the Court said:

> "The jurisdiction of Courts over eminent domain proceedings is wholly statutory and no court has jurisdiction in such matters, except in so far as it is given jurisdiction by the provisions of the Statute" (2 Nichols, Eminent Domain (2 Ed.) Sec. 425, p. 1121).

determination of the question as to the right to condemn, as distinguished from the mere fixation of damages, is not a case or controversy, and why the exercise of the jurisdiction by a Federal court is an interference with the sovereign right of the state to prescribe the particular state court in which proceedings are to be instituted. The importance of the question and the cogency of the reasoning of the opinion of Mr. Justice Holmes justifies a reconsideration of the question. The views of Mr. Justice Holmes are also supported by the following cases in addition to those cited by him:

Burrill v. *Locomobile Co.*, 258 U. S. 34;
City Bank Farmers Trust Co. v. *Schnader*, 291 U. S. 24.

A determination that there is no jurisdiction in the Federal Court would in nowise impair existing judgments of condemnation under state statutes which have been rendered in Federal courts as all such judgments are *res adjudicata*, because the absence of Federal jurisdiction *could* have been raised in those proceedings, and, therefore, must be deemed to have been raised and determined in favor of such jurisdiction.

Jackson v. *Irving Trust Company*, 311 U. S. 494;
Chicot County Draining District v. *Baxter State Bank*, 308 U. S. 371;
Stoll v. *Gottlieb*, 305 U. S. 165;
American Surety Company v. *Baldwin*, 287 U. S. 156.

As to forum non conveniens or the equivalent doctrine of appropriate forum

Even if the District Court had jurisdiction, such jurisdiction should not have been taken under the doctrine of *forum non conveniens*, or appropriate forum,* and the

* The most recent dismissal is found in *Meredith* v. *City of Winter Haven*, 134 F. (2d) 202 (C. C. A. 5th), decided February 3, 1943, where, as here, the state law was not clear.

assumption of jurisdiction was contrary to recent pronouncements of this Court* While this question was not presented below, this Court may nevertheless determine the questions as it did in *R. R. Commission of Texas* v. *Pullman Company*, 312 U. S. 496, and in *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171, where the question was not raised below.

In *Canada Malting Co.* v. *Paterson Steamships, Inc.*, 285 U. S. 413, 422, Mr. Justice Brandeis speaking for a unanimous Court, said:

> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity *and of law* also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal" (Italics supplied).

In Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, 130, this Court said:

> "While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. Canada Malting Co. *v.* Paterson Co., 285 U. S. 413, 422, and authorities cited. It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an

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* In *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171, this Court said:

> "We granted the petition for certiorari because of the doubtful propriety of the District Court and of the Circuit Court of Appeals undertaking to decide such an important question of Illinois law instead of remitting the parties to the State Courts for litigation of the State questions involved in the case."

> appropriate forum. Langnes *v.* Green, 282 U. S. 531, 535, 541. Heine *v.* New York Life Ins. Co., 50 F. (2d) 382.'"*

In *Georgia* v. *Chattanooga,* 264 U. S. 472, 483, a condemnation case instituted by an original bill filed in this court, the court applied these principles specifically to a case of that character. The court said:

> "Its [plaintiff's] contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide that question."

Other recent cases in this Court which have remitted state questions to the State court are:

Chicago v. *Fieldcrest Dairies,* 316 U. S. 168;
R. R. Commission of Texas v. *Pullman,* 312 U. S. 496;
Thompson v. *Magnolia Co.,* 309 U. S. 478;
General American Tank Car Corp. v. *El Dorado Terminal Co.,* 308 U. S. 422.

See:

Public Utilities Com. v. *United Fuel Gas Co.,* 87 Law ed. 310, 313;
54 Harvard Law Review 1379, 1389, cited in *Chicago* v. *Fieldcrest Dairies, supra.*

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* In *Heine* v. *New York Life Ins. Co.,* 50 F. (2d) 382 cited with approval above, the action was brought *at law* in Oregon, by citizens of Germany against a New York corporation and jurisdiction rejected despite the provision of 28 U. S. C. A. § 41 granting the District Court jurisdiction of all suits of a civil nature of common law or in equity * * * between Citizens of a State and foreign States, citizens or subjects * * *." The application of the doctrine of forum non conveniens has not been limited to actions in equity as pointed out in 54 Harvard Law Review pp. 1379, 1389.

One of the determinative questions in the case is as to the construction of Section 1512 R. S. Mo. 1939 and specifically is whether any corporation, *de facto* or otherwise, which for many years has devoted its property to the public service, has been recognized as an existing corporation by the state, has satisfactorily served the public and cannot abandon that service, may nevertheless have its property condemned by another public service corporation which intends to devote the property to precisely the same public use. This question has never been decided by the Missouri courts. Another question which is a question of general law, and which has also never been decided by the Missouri courts, is whether the doctrine that there can be no estoppel against condemnation because the property cannot be withdrawn from condemnation if needed in the public interest should be extended so as to preclude the defense here that there is an estoppel against urging that the corporate owner of the property already dedicated to the public use has forfeited its charter or is operating *ultra vires.*

All of these intricate questions are peculiarly within the province of the state courts to decide.* The Burlington could have filed its condemnation complaint in the state courts and there is no reason to invoke the jurisdiction of the Federal Court to determine state issues in a non-transitory action. There is no sound reason why a foreign corporation seeking to avail itself of the privilege of condemnation granted by a foreign state should have the right to have the Federal court determine local questions or questions of policy and general law *as against residents of that state* whose property is sought to be condemned, merely

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* It is to be noted that none of the Circuit Judges ever practiced law in the State of Missouri and cannot be assumed to be familiar with the history of the statutes involved, the local conditions to which they apply and the character of the state's laws. (*Thompson* v. *Cons. Gas Co.*, 300 U. S. 55, 75).

because the corporation happens to be a citizen of another state. The state itself would have no right to invoke the Federal Court.

Since the decision in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, the question as to whether jurisdiction should be declined, where questions of general law are involved, has become an even more important one because under the doctrine of that case the Federal court is bound to follow State Court decisions no matter how ancient—decided under conditions and State policy wholly different from those existing at the present time*—in the present situation decisions prior to the enactment of the Public Service Commission law which affects the right to abandon property devoted to a public use. In the State Courts those old cases might not now be followed.

So, too, it might well be that after a fuller consideration, the State Supreme Court might now hold in accordance with the probable weight of authority in this country that the forfeiture statute of Missouri is not self-executing. The District judge stated that if at liberty to do so, he would so hold (R. 117).

The language of this Court in *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 484, is apposite:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction— been determined contrary to the law of the State, which in such matters is supreme."

In *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 172 this Court said:

> "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast—a prediction as

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* A persuasive elaboration of this argument is found in the very recent case of *Meredith* v. *City of Winter Haven,* 134 F. (2d) 202, 206, 207 (C. C. A. 5th) in which jurisdiction was declined.

to the ultimate decision of the Supreme Court of Illinois."

The resort to the Federal Courts under the circumstances as here disclosed is probably in conflict with the recent cases in this court above referred to, and such use of the Federal Courts should be denied under the doctrine of *forum non conveniens* or its equivalent.

As to the availability of the defense of waiver or estoppel

The conclusion of the Circuit Court of Appeals that the defendants may not urge the waiver, acquiescence or estoppel of the Burlington to contend that the Bridge Company's charter was forfeited or its acts *ultra vires,* finds no support in existing authorities, is probably untenable and, therefore, is probably in conflict with the rule which the Supreme Court of Missouri will announce when the question reaches that court.* None of the cases in Missouri or elsewhere cited by the Circuit Court of Appeals in support of the court dismissal of the defendants' contention sustains the conclusion or even considered the question. All the cases relied on in that court were cases where a private agreement was urged as a defense to any condemnation, but the property sought to be condemned was not being actually devoted to the same public use and the result of the enforcement of the agreement would have been permanently to withdraw the property from such use. The inapplicability of the principle underlying those cases is made evident when the reason for the rule is borne in mind, namely, that no private agreement of the parties should deprive the public of the right to condemn property which may be needed in the public interest. In none of the cases cited by the Circuit Court to support its conclusion was the property already devoted to the same public use and therefore the

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* *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 206, where this Court said:

> "Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the State law as yet unannounced by the highest court of the State."

effect of the enforcement of the private contract involved in those cases would have been to deprive the public of the use of the property for a public purpose. In the present case, however, the property is now and for many years *has been* satisfactorily devoted to precisely the same public use to which the Burlington seeks to put it, and accordingly the public interest is here nowise involved. The public is not interested as to whether A or B operates the property, and even if the Burlington be estopped from urging forfeiture and *ultra vires* because of its relationship as a stockholder, and in effect co-owner of the property, the property will still remain in the public use and cannot be withdrawn therefrom without permission of the State through its delegate, the Public Service Commission. *State ex rel. P. S. C.* v. *Mo. Southern R. Co.,* 279 Mo. 455. The Burlington can still condemn provided it shows that the property is not being used for the same public use to which it seeks to put it.

As to the construction of Section 1512 R. S. Mo., 1939.

The court below has construed this section, quoted above at page 3, as delegating to a railroad corporation the power to condemn property already devoted to a public use for the same use unless the corporation which has dedicated the property to the public use is a *de jure* corporation operating *intra vires.* As appears in the accompanying brief, page 30, this conclusion is in conflict with principles recognized in Missouri that the state cannot delegate the right to condemn for the same use.* No Missouri case supports the construction of the court below and it is probably in conflict with the Missouri cases which have indicated the purpose of this section, and the determination is probably in conflict with the rule which the Supreme Court of Missouri will announce when the question reaches that court. The construction of the statute by the court below leads to absurd results. That construction cannot be limited to a case where the proposed use is the same as the old use and where, therefore, the public is not affected.

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* That the present and proposed use are the same is uncontradicted (R. 730, 765-6, 282).

If the construction is correct, the Bridge Company cannot prevent the condemnation of its tracks and rights of way for a public use other than a railroad use and which would interfere with or terminate the present use of the property. The result would be that the hundred and more industries of North Kansas City could be deprived of all existing railroad service simply because the Bridge Company, although it has devoted its property to a public use for a quarter of a century without interference by the state, has either forfeited its corporate charter or has been acting *ultra vires*. Having in mind the fact that this service cannot be abandoned voluntarily (*State ex rel. P. S. C.* v. *Missouri Southern Ry. Co.*, 279 Mo. 455),* it is inconceivable at the present time that this old statute of 1866** should be so construed that the present use could be terminated at the instance of another public service corporaion and the industries deprived of all transportation service. An important question of construction not determined by the Missouri courts arises.

As to the applicability of the self-executing forfeiture provisions

The conclusion of the Circuit Court of Appeals that the self-executing forfeiture provisions of the Missouri statute (section 5248 R. S. Mo. 1939, quoted *supra*), which were originally not applicable to union depot companies, have become applicable by virtue of the statutes of 1879 and 1899, is probably in conflict with applicable local decisions which have held that revisions and amendments, such as here were made, do not make all provisions of the revisions applicable where they were inapplicable before. The provisions and history of the two statutes referred to and the applicable Missouri cases are set forth in Point II of the annexed brief at p. 38 *infra*, and it is there shown that the decision below is probably in conflict with the Missouri cases.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal

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* The Commission held that the Bridge Company is under the jurisdiction of the Commission (p. 14 footnote).

** See p. 35 *infra*.

of this Court directed to the Judges of the United States Circuit Court of Appeals for the Eight Circuit commanding them to certify and send to this Court a transcript of the record in this case to the end that the decree of said court may be reviewed and reversed to the extent that it affirms the judgment of the District Court, and the cause remanded to the District Court with instructions to dismiss the case, or if this relief be denied that it be remitted to the Circuit Court of Appeals for the Eighth Circuit for decision of the questions left undetermined in that court (following the practice in *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 241, and *Klaxon Company* v. *Stenton Co.*, 313 U. S. 487, 498), and that your petitioners may have such other, further or different relief in the premises as to this Court may seem appropriate.

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HENRY N. ESS,
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Petitioner,

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